IN THE

Supreme Court of the United States

October Term, 1978
No. 78-825

BERTIL A. GRANBERG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BERTIL A. GRANBERG
Pro Se

Office and Post Office Address:
444 N.E. Ravenna Boulevard
Seattle, WA 98115

TABLE OF CONTENTS

TABLES OF AUTHORITY

Table of Cases

Statutes

Other Authority

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. _____

BERTIL A. GRANBERG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 17, 1978, in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit in case No. 77-3424 was by memorandum and is unreported. It is reprinted herein

as Appendix A. The decision of the District Court for the Western District of Washington, in case No. CR-170M, was by way of Judgment and Committment dated October 12, 1977, and is unreported. It is reprinted herein as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1978. A petition for rehearing was filed on August 28, 1978. That petition was denied by order of the court of appeals on September 25, 1978. On October 18, 1978, Mr. Justice William H. Rehnquist signed an order extending the time for filing a petition for writ of certiorari to and including November 20, 1978. The jurisdiction of this Court is invoked to review the judgment in question by writ of certiorari, pursuant to 28 U.S.C. § 1254(1). Jurisdiction of the District Court for the Western District of Washington was based upon 18 U.S.C. § 3231.

QUESTIONS PRESENTED

1. Whether the court of appeals erred insofar as it held that the trial court properly admitted into evidence partial original and partial photocopies of employment tax returns filed by the petitioner.

2. Whether the court of appeals erred insofar as it held as proper, verbal testimony by the governments's witness, concerning the upper portion of the backside of tax returns for which neither originals nor copies were available.

3. Whether the court of appeals erred insofar as it affirmed the trial court's ruling admitting into evidence testimony that the taxpayer's witness refused to confer with the government at recess during trial.

STATUTES INVOLVED

The statutes involved herein refer to Federal Rules of Criminal Procedure, sections of the Internal Revenue Code, and sections of

the Judicial Code. Of particular note are the specific provisions of the Federal Rules of Evidence, and the Advisory Committee's notes thereto, insofar as they are applicable to admission into evidence of the disputed documents in this matter.

Statutes:

Federal Rules of Criminal Procedure
Rule 44

Internal Revenue Code (26 U.S.C.)
Section 7206(1)

Judicial Code (28 U.S.C.)
Section 1733

Federal Rules of Evidence (and/or
Advisory Committee's Notes to)
Rule 1001
Rule 1002
Rule 1003
Rule 1004

STATEMENT OF THE CASE

The facts in this case are not in substantial dispute and, insofar as the questions presented in this Petition for Certiorari, they are in large part adequately set forth in the memorandum of the

court of appeals[1]. The petitioner herein appealed from a judgment of conviction, following jury trial, of the offense of knowingly having filed false employer's quarterly federal tax returns, in violation of 26 U.S.C. § 7206(1). Petitioner was committed for imprisonment for a term of one year and fined the sum of $5,000 on each of two counts; said sentences to run concurrently (R. 85). The district court Judgment and Committment order was entered on October 12, 1977.[2] The Court of Appeals for the Ninth Circuit affirmed in a memorandum filed August 17, 1978. The questions raised by petitioner relate to the admission into evidence of photocopies of the tax returns. At trial, the government offered, over objection of the petitioner, the originals of the bottom portions of the tax returns (Plaintiff's Ex. 1 and 3). The trial court also admitted, over petitioner's objection,

[1]See Appendix A

[2]See Appendix B

photocopies of the front of the top half of the tax returns (Ex. 1-A and 3-A). The government at trial offered only the unsupported statement of counsel that the originals were destroyed (Tr. 154-155). No documentation or testimony of such assertion was offered.

Special agents made photocopies (Ex. 1-A and 3-A) of the entire front of the tax returns. The originals of the bottom half of the front of the returns are also in evidence (Ex. 1 and 3). A visual inspection of Ex. 1 and 3 (originals) reveals information not reflected on Ex. 1-A and 3-A (photocopies).

It should also be noted that the special agent photocopied the returns upon receipt and then had the originals in his possession for two years. At the trial, where the complete originals were not available or offered in evidence, there was no explanation offered by the government as to why the partial originals offered into evidence contained information not shown on the photocopies.

The government's witness, Mr. Miyahara, had the original of the top of the reverse side of the returns in his possession for two years. Then, without making copies, he sent the returns for processing and destruction while at the same time recommending prosecution. It is contended by the petitioner that it was improper for Miyahara to testify at the trial concerning the content of the original where neither the originals nor copies were available for inspection by the defendant-petitioner.

On cross-examination, Helen Howe, previously called by the Government as a witness, was asked whether she refused to talk to the Government during a recess at trial. Over objection she was permitted to answer that she had so refused. Her refusal to talk to the Government, for whatever reason, may have led the jury to believe she favored the taxpayer and was prejudiced against the Government. Petitioner contends that an attempt to show bias in this manner is improper.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Ninth Circuit has rendered a decision in conflict with decisions of other courts of appeals concerning the questions presented in this petition for certiorari. The court of appeals has sanctioned a departure from the accepted and usual course of judicial proceedings by the district court, so as to call for an exercise of this Court's power of supervision (Rule 19, Supreme Court Rules).

The court of appeals erred in affirming the district court's evidentiary rulings admitting certain documentary evidence. Taxpayer objected at the trial, on the ground that Ex. 1 and 3 were incomplete and that Ex. 1-A and 3-A were not duplicates.

The taxpayer first contends that Ex. 1-A is obviously <u>not</u> a copy of the original Ex. 1. Note that someone has handwritten the identifying number "91-0904832" on the original Ex. 1. This notation is not shown on the alleged copy

Ex. 1-A. Also, who is "RDJ" shown on Ex. 1 but not shown on Ex. 1-A? What other notations were made on the original top half of the form 941 which are not shown on the alleged copy, Ex. 1-A?

Exhibits 3 and 3-A contain the same problem with the identifying number and "RDJ". Who is "RDJ" and what would that person testify to? Also, who wrote the handwritten amounts "$9,099.21", "$1,064.61" and "$2,086.01" on the original Ex. 3, that are not on the alleged copy, Ex. 3-A?

Any notation made by Internal Revenue Service or its agents on the original returns, front or back, top or bottom, during the period of over two years while Internal Revenue was actively pursuing its investigation, could be admissable to prove petitioner's innocence. Special Agent Miyarhara, having the originals of the return in his possession for two years, showed utmost bad faith in forwarding them to Odgen, Utah, thereby making them and evidence they would disclose beneficial to petitioner, unavailable for use at trial.

In Mullican v. United States, 252 F.2d 398 (5th Cir. 1958), the court held that under 28 U.S.C. § 1733 and Rule 44 of the Federal Rules of Civil Procedure, a certification of copies of official records must state that the person making the certification has custody of the records involved.

Agent Miyarhara was not the custodian of the original complete tax returns.

An examination of the Federal Rules of Evidence reveals that Ex. 1, 1-A, 3 and 3-A were improperly admitted. Rule 1001 of the Federal Rules of Evidence considers "Contents of Writings, Recordings, and Photographs". It sets forth definitions including "photographs", "original", and "duplicate". The complete text of Rule 1001 is attached hereto as a portion of Appendix C.

Rule 1002 of the Federal Rules of Evidence provides as follows:

> To prove the content of a writing, recording, or photograph, the original

> writing, recording, or photograph is required, except at otherwise provided in these rules or by act of Congress.[3]

Rule 1003 of the Federal Rules of Evidence provides as follows:

> A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.[4]

The House Judiciary Committee Report, 93-650, for Rule 1033, F.R.E., states in part as follows:

> The Committee approved this Rule in the form submitted by the Court, with the expectation that the courts would be liberal in deciding that a "genuine question is raised as to the authenticity of the original".

In this case, there is a genuine question as to authenticity of the original because the defendant had not at trial seen the top half of the forms 941 as they were filed. Also, it would be unfair to admit exhibits 1-A and 3-A

[3]See Appendix C attached hereto.
[4]Complete text of Rule 1003 is attached as a portion of Appendix C.

which are obviously not copies of the original as filed.

The Advisory Committee's note to Rule 1003 states:

> Other reasons for requiring the original may be present when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party. United States v. Alexander, 326 F.2d 736 (4th Cir. 1964). And see Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd., 265 F.2d 418, 76 A.L.R. 2d 1344 (2d Cir. 1959).

In United States v. Alexander, supra, there was an indictment for stealing a government check from a mail box. While the check was in the possession of the postal inspector, he made a thermofax copy but the name and address of the payee was not reproduced so he typed it in. He then gave the original to the payee who cashed it. The trial court admitted the copy into evidence and the appellate court reversed. The incomplete copy of the check is identical to Ex. 1-A and 3-A in the petitioner's case.

Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd., supra, was a civil case wherein

photostats prepared specially for the litigation were rejected. Those photostats are identical to Ex. 1-A and 3-A which Mr. Miyahara and/or Mr. Einfeld prepared for use in the petitioner's trial.

Rule 1004(1) and (2) of F.R.E. provides as follows:

> Admissibility of Other Evidence of Contents
> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if --
> (1) Originals lost or destroyed. -- All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith: or
> (2) Original not obtainable. -- No original can be obtained by any available judicial process or procedure;

In this case, the originals are not lost or destroyed. The original can be obtained from Social Security in Baltimore.

The House Judiciary Committee Report, 93-650, for Rule 1004(1), F.R.E., states in part as follows:

> The Committee approved Rule 1004(1) in the form submitted to Congress. However, the Committee intends that loss or destruction of an original by another person at the instigation of the proponent should be considered as tantamount to loss or destruction in bad faith by the proponent himself.

This report raises the interesting question of whether Mr. Miyahara's actions were tantamount to bad faith when he caused the top half of the forms 941 to be sent to Social Security after keeping them in his possession for over two years.

In United States v. Heath, 260 F.2d 623 (9th Cir. 1958), the taxpayer turned over all his records to the government and was later indicted. He filed a motion to produce his records but the government had lost them. The indictment was then dismissed. The court's opinion states as follows at p. 629:

> It would seem the action in this case could be grounded upon impossibility of fair trial without this evidence and, specifically, on the failure of the government to produce the documents as required by the Rule.
> The cynical suggestion in the brief of the government attorneys, "that the manner in which the disability [such as loss or destruction of records vital to the defense] befalls the defendant, whether at the hands of the agents of the United States or otherwise, is immaterial,"

> should call for castigation, but we assume it springs from misplaced zeal. In any event, the argument must be and is emphatically rejected. It has been wisely said that the agents of the government should not act an ignoble part. No more ignoble action could be imagined than for them to obtain these documents from the defendant voluntarily, give no receipt to prove their existence and their possession, suffer the records to be destroyed and then claim the right to prosecute when, by their action, his defense is impaired, if not destroyed.

The examination of the complete original (front and back) of the returns in question would show a reference to "Timber Creek" another entity controlled by petitioner and that therefore, the government at all times had been advised and was aware of the fact that portions of the wages were being reported under the Timber Creek partnership. Such references or notations would be on the originals, either front or back, made by the petitioner or the government at some time before or after the photographs were made by Mr. Miyahara and/or Mr. Einfeld and some time prior to the destruction of the top half of the original returns.

It was improper to admit evidence of the tax returns, where portions of them had been made unavailable by the government. "A prosecutor's negligent suppression of material evidence tending to exculpate the defendant compels the Court to take remedial action . . . by dismissing the indictment". United States v. Birrell, 276 F. Supp. 798 (S.D.N.Y. 1967).

In United States v. Consolidated Laundries, 291 F.2d 563 (2d Cir. 1961) the court reversed a conviction upon a finding that the government, as custodian of the evidence, had, through its negligence, breached its duty to keep such evidence so that it would be available for use at trial by all parties.

In United State v. Heath, 147 F. Supp. 877 (D. Hawaii 1957), appeal dismissed, 260 F.2d 623 (9th Cir. 1958), the Ninth Circuit affirmed the trial court's order dismissing an indictment where the government, through its negligence, had lost documents which were relevant to the charges in the indictment and necessary to the preparation of the defense.

Due process requires that evidence which might have led the jury to entertain a reasonable doubt about petitioner's guilt must be disclosed. United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966).

It is clear that the decision herein is in serious conflict with the above cited decisions from other courts of appeals on the same question.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

BERTIL A. GRANBERG
Pro Se

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 77-3424
v.	)	
BERTIL A. GRANBERG, Defendant-Appellant.	)	MEMORANDUM

Appeal from the United States District Court
For the Western District of Washington

BEFORE: TRASK and HUG, Circuit Judges, and
GRAY, District Judge.*

The defendant appeals from a judgment of conviction, following jury trial, of the offense of knowlingly having filed false Employer's Quarterly Federal Tax Returns, in violation of 26 U.S.C. § 7206(1). We affirm.

The Sufficiency of the Evidence. From July 1, 1973, through February 28, 1974, the defendant was in possession and the operator of an apartment complex in the State of Washington known as Burien Garden Apartments. The employment tax returns that the defendant filed for the third quarter of 1973 and the first quarter of 1974 made no mention of several of the employees of Burien Garden Apartments and thus understated the total wages and the tax liability by several

*Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

thousand dollars. On May 23, 1974, the defendant was interviewed by Special Agent Miyahara of the Intelligence Division of the IRS, who informed him that he was the subject of a ciriminal investigation as a result of these quarterly returns. Thereafter, the defendant caused to be filed employment tax returns on behalf of the Timber Creek Apartments that were located in Oregon and in which he also had a major ownership interest. These returns included reference to the Burien Garden Apartments employees and their wages that had been left ourt of the earlier filed suspect returns.

There was considerable evidence at the trial that was completely out of harmony with the defendant's involved and almost incomprehensible attempts to explain his actions. It is easy to understand how the jury could have found beyond reasonable doubt that the defendant intentionally filed false returns that understated his tax liability for the Burien Garden Apartments, and then, as an afterthought, tried to avoid criminal liability by means of the Timber Creek returns.

Admission Into Evidence Of Copies Of The Tax Returns. The original of the bottom half of each of the two Burien Garden Apartments returns was admitted into evidence. The upper halves had been detached previously and sent by IRS to the Social Security Administration, as a matter of routine processing, inasmuch as the front of that portion of the form called for information of interest to that body. However, before such separation occurred, Special Agent Miyahara made xerox copies of the front of the top portion of each return, and these were admitted into evidence. The appellant objected to the introduction of these exhibits on the grounds that they were incomplete and that the xeroxed portions were not originals.

We believe that the copies were properly admitted under authority of Rule 1003 of the Federal Rules of Evidence. These copies clearly were "duplicates" within the meaning of Rule

1001(4); no genuine question was raised concerning the genuineness of the originals; and, under the circumstances, there was no unfairness in such admission, the originals having been destroyed.

In urging that the duplicates were incomplete, the appellant points out that the reverse side of the upper portion of the form was not part of either exhibit. That portion of the paper consists only of printed instructions for the completion of the form and contains no place for the taxpayer to supply information. Mr. Miyahara testified that he examined the entirety of the two documents when the xerox copies of the front were made and that there were no notations on the upper portion of the reverse side. There is nothing in the record to the contrary. Although the appellant's counsel has suggested that his client recalls having made some reference to Timber Creek on the challenged forms, the appellant gave no such testimony. In any event, it is hardly likely that a taxpayer would use the part of the form devoted ertirely to printed instructions as the place to insert such vital information as the appellant's counsel implies was done here.

Other Evidentiary Rulings. The trial court was well within its discretion in allowing the prosecutor to elicit from a defense witness, on cross-examination, that she had refused to talk with Government counsel before taking the stand. The obvious purpose of such inquiry was to show bias, and the response was relevant to that purpose.

There was no error in the admission of prosecution evidence that the defendant returned to the Burien Garden Apartments office following his eviction and took accumulated rent receipts from the safe. Such evidence was justified as tending to show the extent to which the appellant asserted control over the apartment complex, in contrast to his contention that he had been operating it solely as an agent, and thus was

not obliged to file the subject employer's quarterly tax return.

Inasmuch as the evidence was fully sufficient to support the conviction and we can find no reversible error in evidentiary rulings, the judgment of conviction is affirmed.

APPENDIX B

JUDGMENT AND COMMITMENT Rev. 1-68) Cr. Form No. 25

DBB:jt

United States District Court

FOR THE

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

FILED IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON

OCT 12 1977

EDGAR F. CHEELD, Clerk

By _____ Deputy

United States of America

v.

BERTIL A. GRAIBERG

No. CR77-170M

On this 7th day of October, 19 77 came the attorney for the government and the defendant appeared in person and with his counsel, George Constable.

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of making and subscribing, under the penalties of perjury, false employment tax returns in violation of Title 26, United States Code, Section 7206(1)

as charged in the Indictment

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

as to Count I

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR, and fined the sum of FIVE THOUSAND DOLLARS ($5,000.00).

IT IS ADJUDGED that as to Count II the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR, and fined the sum of FIVE THOUSAND DOLLARS ($5,000.00).

It Is Adjudged that the sentence imposed as to Count II shall run concurrently with the sentence imposed in Count I, and that the total fine imposed shall be $5,000.00.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Presented by:

David B Bakes

DAVID B. BAKER

Assistant United States Attorney

Walter T. Craig

United States District Judge

Clerk

(Insert "by" (name of counsel), counsel" or "without counsel." The court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." (Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.) (Insert the appropriate number of counts.) (If required.) Enter (1) sentence or sentences, specifying counts if any; 2) whether sentences are to run concurrently or consecutively with, if consecutively, what prior term is to begin with reference to termination of preceding term or to any other outstanding or waived sentence; 3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. Enter any order with respect to suspension and probation. May use of Court to recommend a particular institution.

85

APPENDIX C

Federal Rules of Evidence

ARTICLE X. Contents of Writing, Recordings, and Photographs

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) Writings and recordings.--"Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording or other form of data compilation.

(2) Photographs.-- "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original.--An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) Duplicate.-- A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenicity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if--

(1) Originals lost or destroyed.--All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable.--No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent.--At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral matters.--The writing, recording, or photograph is not closely related to a controlling issue.

No. 78-825

In the Supreme Court of the United States

OCTOBER TERM, 1978

BERTIL A. GRANBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-825

BERTIL A. GRANBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction of filing false employment tax returns on the ground that the trial court erred in admitting certain exhibits into evidence.

After a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on two counts of filing false employment tax returns for the quarters ending September 30, 1973, and March 31, 1974, in violation of 26 U.S.C. 7206(1). The trial court sentenced him to concurrent one-year terms on each count and a fine of $5,000. The court of appeals affirmed (Pet. App. A-1 to A-4).

1. Petitioner contends (Pet. 5-6) that the trial court erred in admitting the originals of the front bottom half of the employment tax returns in question (Govt. Exs. 1 and 3) and photocopies of the front of the top portion of those

returns (Govt. Exs. 1-A and 3-A)[1] because the partial originals contained information not reflected in the photocopies. In petitioner's view, the notations on the originals could have disclosed information that would have been beneficial to his defense.

The pertinent facts are as follows: At trial, Internal Revenue Service personnel explained that an employer's quarterly federal tax return consists of two parts. The front of the top portion has spaces for a list of employees by name, social security number, and gross wages, while the back of the top portion contains instructions to complete the entire return. The front bottom portion is for summary information with respect to total wages subject to employment taxes and total employment taxes. The back of the bottom part is used for information regarding employment tax deposits made by the employer (Tr. 86-87; 158-159). In the normal course of processing such a return, the Internal Revenue Service detaches the top portion and forwards it to the Social Security Administration. IRS retains the bottom portion (Tr. 89, 168). Social Security microfilms the front of the top portion and destroys the original (Tr. 154).[2]

Agent Paul Miyahara testified that on April 22, 1974, he received the original Burien Garden Apartments return for the third quarter of 1973 from Revenue Officer

[1]Petitioner was the operator of the Burien Garden Apartments. The tax returns in question, filed by petitioner, did not report the wages of several of Burien's employees and thus understated the total wages and the tax liability by several thousand dollars (Pet. App. A-1 to A-2).

[2]After petitioner objected to admission of Government Exhibit 1, counsel for the government informed the court that he had advised petitioner's counsel "weeks ago" that the original of the IRS-retained copy would be introduced, that the top portion had been sent to Social Security, and that petitioner's counsel agreed to accept a photocopy rather than have the prosecution obtain the top portion from Social Security (Tr. 85).

Einfeld. Miyahara examined the entire return and photocopied all portions of the return that contained any of petitioner's notations (Tr. 158-161). He did not photocopy the reverse side of the return because he observed no notations on that part (Tr. 161). The Burien Garden 1974 first quarter return was received and copied in the same manner and to the same extent (Tr. 162-164). In accordance with Internal Revenue Service policy,[3] Miyahara forwarded the returns to the Internal Revenue Service Center for processing (Tr. 194).

The decision below correctly upheld the trial court's admission of the exhibits into evidence. Rule 1003 of the Federal Rules of Evidence provides that duplicates[4] are admissible to the same extent as originals, unless a genuine question is raised as to the authenticity of the original or it would be unfair to admit the duplicates under the circumstances.

Petitioner did not raise any question about the authenticity of the original at trial (Tr. 106, 110-114, 172-177, 184, 201).[5] He nevertheless claims (Pet. 11) that a genuine question of authenticity exists because "the defendant had not at trial seen the top half of the forms 941 as they were filed." Petitioner's complaint is that the reverse side of the upper portion of the form was not part of either exhibit. But as the court of appeals observed (Pet. App. A-3), that portion of the form consists only of printed instructions and contains no place for the taxpayer to supply information. At all events, Agent Miyahara testified that he examined the entirety of the

[3]5 Administration, Int. Rev. Manual (CCH) par. 9326.4(2), p. 28,089.

[4]As defined by Rule 1001(4), "A 'duplicate' is a counterpart produced * * * by means of photography * * *."

[5]Petitioner first raised a challenge to the authenticity of the documents in his post-trial motion for judgment of acquittal.

documents when the copies of the front were made and that there were no notations on the upper portion of the reverse side.

Petitioner's claim (Pet. 15) that the complete originals of the returns would show a reference to "Timber Creek" (another entity controlled by petitioner) is unsupported by the record. In rejecting this contention, the court of appeals correctly pointed out (Pet. App. A-3) that petitioner gave no such testimony at trial and that, in any event, "it is hardly likely that a taxpayer would use the part of the form devoted entirely to printed instructions as the place to insert such vital information as the * * * [petitioner] implies was done here." Petitioner has never shown that there was any genuine question as to the authenticity of the original returns or of the copies made from those returns.

Rule 1004(1) of the Federal Rules of Evidence provides that the original of a writing is not required and that other evidence of the contents of a writing is admissible if all the originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. The evidence showed that the top parts of the originals were destroyed in routine processing by the Social Security Administration, after having been microfilmed. Thus, there is no evidence of bad faith in this case. The sufficiency of the foundation for the admissibility of secondary evidence lies within the discretion of the trial court. *Ellis* v. *United States*, 321 F. 2d 931 (9th Cir. 1963). In these circumstances, the trial court properly exercised its discretion in admitting the copies into evidence. *United States* v. *Morgan*, 555 F. 2d 238 (9th Cir. 1977).[6]

[6]The authorities upon which petitioner relies (Pet. 10, 12) are distinguishable. In *Mullican* v. *United States*, 252 F. 2d 398 (5th Cir. 1958), the court held copies inadmissible because of a lack of proper authentication of official records under Rule 44, Fed. R. Civ. P., and Rule 27, Fed. R. Crim. P. *Toho Bussan Kaisha, Ltd.* v. *American Pres. Lines, Ltd.*, 265 F. 2d 418 (2d Cir. 1959), turned on a failure to lay a sufficient foundation under New York and federal business entry statutes. Finally in *United States* v. *Alexander*, 326 F. 2d 736 (4th Cir. 1964), no reason was given for failure to produce the original.

2. Finally, petitioner argues (Pet. 3, 7) that the trial court erred in allowing Helen Howe, a defense witness, to answer the prosecutor's question whether she had refused to talk to government counsel during a trial recess. Over objection, she was allowed to answer that she came to testify for petitioner (Tr. 620). The obvious purpose of the question, as the court of appeals pointed out (Pet. App. A-3), was to demonstrate the witness's bias in favor of petitioner. Her response to the question was relevant to that purpose. It is well settled that counsel is entitled to considerable leeway in cross-examination (*United States* v. *Birnbaum*, 337 F. 2d 490 (2d Cir. 1964)), and the extent of cross-examination rests largely in the discretion of the trial court (Rule 611(b), Fed. R. Evid.; *United States* v. *Drake*, 542 F. 2d 1020 (8th Cir. 1976), cert. denied, 429 U.S. 1050 (1977)). There is no showing that the trial court abused its discretion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

DOJ-1979-01